IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 2ND AUGUST 2007 / 11TH SRAVANA 1929

RSA.No. 582 of 2007()

AS.18/2002 of DISTRICT COURT,KOZHIKODE
OS.526/1999 of ADDL.M.C.,KOZHIKODE-I
(OS. 210 /1998)
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APPELLANT/ RESPONDENT PLAINTIFF

R.M.JAYADEVAN,S/O.KARUNAKARAN,
RARAM MADATHIL, KASABA AMSOM,DESOM,
KOZHIKODE TALUK

BY ADV. SRI.R.PARTHASARATHY
SRI.A.RADHAKRISHNAN NAIR

RESPONDENTS/APPELLANTS DEFENDANTS
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1. A.T.MAMMEDKOYA,S/O.KASMI,
ATTUMMATHODUKAYIL,KACHERI AMSOM,DESOM,
KOZHIKODE TALUK.

2. A.T.ALIKOYA, S/O.KASMI, DO..DO..

3. A.T.SHAFEEQUE,
S/O.ABDUL RAHIMAN, DO...DO..

4. A.T.MANZOOR,S/O.,MAMMEDKOYA, DO..DO...

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 02/08/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER ON I.A.NO.1374/07 IN R.S.A.582/07

DISMISSED

2/8/2007

SD/-M.SASIDHARAN NAMBIAR,JUDGE.

//True copy//

PS to Judge.

M.SASIDHARAN NAMBIAR,J.

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R.S.A NO. 582 OF 2007

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Dated this the 2nd day of August, 2007

JUDGMENT

Plaintiff in O.S.526/1999 on the file of Munsiff Court, Kozhikode is the appellant. Defendants are the respondents. Appellant instituted the suit seeking a decree for permanent prohibitory injunction restraining respondents from trespassing into the remaining portion of the plaint C schedule property excluding plaint A and B schedule properties. Case of the appellant is that plaint A schedule property is the property originally obtained by Peter Charles on karaima right which subsequently vested on Umayumma and and plaint B schedule property subsequently trespassed and reduced into the possession of karaima tenant and the remaining portion of the plaint C schedule property is in his absolute possession and enjoyment. It was contended that when the original karaima tenant under whom the

respondents claim right, trespassed into the plaint B schedule property, O.S.347/1968 was filed seeking a decree for recovery of possession of plaint B schedule property and for a permanent prohibitory injunction in respect of the remaining portion of plaint C schedule property. But under Ext.A4 judgment and Ext.A3 decree, recovery of possession of plaint B schedule was denied and a decree for injunction was granted in respect of the remaining portion of plaint C schedule property and judgment debtors thereafter transferred the property in favour of respondents and they have no manner of right or possession over the remaining portion of the plaint C schedule property other than plaint A and B schedule properties and therefore they are to be restrained by a decree for permanent prohibitory injunction. Respondents resisted the suit contending that besides plaint A schedule property some more extent of land was in the possession of Peter Charlesvaidyan who obtained the karaima right and legal heirs of

Anandan were not in possession of the remaining portion of plaint C schedule property and as against the decree and judgment in O.S.347/1968, A.S.274/1974 was filed and against that judgment S.A.941/1978 was filed and after the death of Ummayumma her right over the property devolved on her children Mammadkoya and Kadeeja and Kadeeja died and the entire right devolved on Mammadkoya and he was in possession of the property and while he has been in possession of the property, there was a structure and a well and he has been in possession of a property having an extent of 5 1/4 cents and Mammadkoya assigned that property in favour of Noorjahan as per assignment deed dated 8.12.1989 and 29.10.1990 and Noorjahan has been in possession of 5 1/4 cents of land and while the property was in the possession of Mammadkoya, he altered the house into a hotel and was in possession of the same till it was assigned to Noorjahan and Noorjahan partitioned the hotel into six rooms and separate assignment numbers were

obtained from the Corporation and thereafter she assigned her right over the structure and the property to the respondent as per assignment dated 1.3.1995 and they applied for obtaining plan and licence from the Corporation and the C.D.A and they constructed the building in the property and plaint C schedule property cannot be identified and appellant is not entitled to the decree for injunction sought for. Respondents on their part filed O.S.210/1998 seeking a decree for declaration and mandatory injunction in respect of 5 ½ cents claimed in the written statement in O.S.526/1999. Both the suits were jointly tried.

2. On the evidence of PW1, DW1 and Exts.A1 to A5, Exts.B1 to B14, Exts.C1 to C6 learned Munsiff found that respondents have no right over the 5 1/4 cents of property claimed by them in O.S.210/1998 and therefore dismissed that suit. Upholding the case of the appellant, a decree for injunction was granted in O.S.526/1999. Respondents challenged the decree and judgment in O.S.526/1999 before

District Court, Kozhikode in A.S.18/2002. The dismissal of O.S.210/1998 was challenged in A.S.17/2002. Learned District Judge on reappreciation of evidence confirming the findings of learned Munsiff dismissed A.S.17/2002. The learned District Judge on the evidence found that plaint C schedule property excluding plaint B schedule property was not identified and though the properties were originally demarcated in O.S.347/1968 that report and plan were not produced and therefore without identification of the properties appellant is not entitled to the decree for injunction sought for in O.S.526/1999. Hence the decree and judgment passed by the Munsiff was set aside. The suit was dismissed. The judgment in A.S.18/2002 O.S.526/1999 is challenged in the appeal.

3. Learned counsel appearing for appellant was heard.

4. The argument of learned counsel is that the Commissioner has identified the property and

demarcated plaint A and B schedule properties together as plot A B T U L M N O V E F G H I in Ext.C4 plan and therefore finding of the first appellate court that property is not identified is unsustainable. It was also argued that respondents being the assignees of the defendants in O.S.347/1968 are bound by Ext.A3 decree and Ext.A4 judgment, whereunder a decree for injunction restraining defendants therein from trespassing into the remaining portion of plaint C schedule property excluding A and B schedule properties was granted and respondents are only claiming rights from the judgment debtors in Ext.A3 decree and therefore first appellate court should not have interfered with the decree granted by the trial court. Learned counsel argued that when courts below found that plaint A, B and C schedule properties in O.S.347/1968 is the same A B C schedule properties in the present suit and a decree for injunction was granted in the earlier suit, first appellate court was not justified in

interfering with the decree granted by the trial court especially when the identity of the property was not disputed at the time of evidence. Learned counsel also argued that when the appellant sought a decree for mandatory injunction by filing an application to amend the plaint court should not have dismissed the same and in such circumstance the decree and judgment passed by the first appellate court are to be set aside.

5. On hearing learned counsel I do not find any substantial question of law involved in the appeal. As rightly found by first appellate court, O.S. 347/1968 was earlier filed by the appellant against the assignor of the respondents, claiming an identical relief except that a decree for recovery possession of plaint B schedule property was claimed and rejected under Ext.A3. What was contended by appellant in the previous suit was also that the karaima right is only in respect of plaint A schedule property and plaint B schedule property is the trespassed area and the

karaima tenant is not entitled to trespass into the remaining portion of plaint C schedule property. A decree for recovery possession of plaint B schedule property, which was alleged to be the trespassed area was sought for. Under Ext.A3 and A4, trial court dismissed the claim for recovery of possession of plaint B schedule property and granted a decree for injunction against trespassing into the remaining portion of plaint C schedule property, excluding plaint A and B schedule properties. It is also admitted case that though first appeal and second appeal were filed against the said decree, was not interfered. Therefore under Ext.A3 decree the karaima tenant was restrained from trespassing into the remaining portion of plaint C schedule property excluding plaint A and B schedule properties. Even according to respondents, they are claiming right under the karaima tenant who was the judgment debtor under Ext.A3 decree. If that be the case, I do not find what was the reason which compelled appellant to

seek another decree for injunction, when already under Ext.A3 decree, which could be enforced even as against assignees of the judgment debtors subsisting. When the assignees of the judgment debtors therein are also bound by the decree, there is no necessity for another decree.

6. Whatever it be when another suit seeking a decree for permanent prohibitory injunction was instituted the court has to find whether appellant has established his possession of the remaining portion of plaint C schedule property, excluding plaint A and B schedule properties. As rightly found by the first appellate court when such a decree is sought, it is the duty of the appellant to establish the identity of A and B schedule properties and the remaining portion of plaint C schedule property.

7. On appreciating the evidence first appellate court found that even when the Commissioner inspected the property, Commissioner could not identify the properties and could only

boundaries on the east and north of plaint C schedule property. As rightly found by first appellate court, when appellant is claiming a decree on the basis of Ext.A3 decree the proper course would have been to produce the copy of report and plan marked in that suit whereunder plaint A and B schedule properties were identified and on which basis a decree for injunction in respect of remaining portion of plaint C schedule property was granted. Though the description of A, B and C schedule properties in that suit and this suit are the same as found by the courts below, without proper identification of the property appellant is not entitled to the decree for injunction.

8. Even according to appellant, plaint A schedule property is the property covered under the karaima arrangement. It is evidenced by a document. If that be so,plaint A schedule property should have been identified with reference to the document. The right of the respondent over the

plaint A schedule property was not disputed. Plaint B schedule property was alleged to have been trespassed upon by the karaima tenant in O.S.347/1968. Appellant is not claiming any decree in respect of that property also. In that case appellant should have identified plaint C schedule property and demarcated plaint A schedule property being the area covered by karaima document and plaint B schedule property being the trespassed property. If that much is established and appellant established his possession he is entitled to a decree for injunction. As it was not done, first appellate court rightly held that appellant is not entitled to the decree for injunction granted by the trial court. In view of the decree in Ext.A3 and A4 appellant should have identified the properties to enable the court to grant a decree in his favour. If the case of the appellant is that respondent trespassed upon a portion of the remaining property also and therefore a decree for mandatory injunction, is to

be granted, in the circumstances of the case appellant could have sought a decree for recovery of possession. As no substantial question of law is involved, appeal is dismissed in limine.It is made clear that dismissal of the suit will not prevent appellant from seeking a decree for recovery of possession on the strength of his title, after establishing the identity of plaint A and B schedule properties.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

W.P.(C).NO. /06

JUDGMENT

SEPTEMBER,2006